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April 20, 2000

RECEIVED
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Magalie R. Salas, Esq.
Secretary
Office of the Secretary
Federal Communications Commission
TW-325
445 12th Street, S.W.
Washington, D.C. 20554

Re: CC Docket No. 96-45; Hertz Technologies, Inc.'s Comments in Support of AT&T March 1, 2000 Petition for Reconsideration

Dear Ms. Salas:

Enclosed please find for filing the original and four (4) copies of Hertz Technologies, Inc.'s comments in support of the Petition for Reconsideration of the Commission's Seventeenth Order on Reconsideration filed by AT&T on March 1, 2000 in the above-referenced docket.

Also enclosed is a copy of this letter and its enclosure for your acknowledgment of receipt via our messenger.

Please do not hesitate to contact the undersigned should you have any questions regarding this filing.

Sincerely,

John W. Butler

No. of Copies rec'd 0+4
List ABCDE

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Federal-State Joint Board on Universal Service	)	**CC Docket No. 96-45**

Comments of Hertz Technologies, Inc.
On
AT&T Petition for Reconsideration

Hertz Technologies, Inc. ("Hertz"), by its undersigned attorneys, submits these comments in support of the Petition for Reconsideration of the Commission's Seventeenth Order on Reconsideration filed by AT&T on March 1, 2000, in the above-captioned proceeding. For the reasons stated by AT&T, and for the additional reasons stated below, the Commission's current method of calculating Universal Service Fund (USF) contributions based on prior-year revenues is inequitable, discriminatory, and not competitively neutral. As such, the methodology violates Section 254(d) of the Communications Act and the Commission's orders regarding USF. Accordingly, Hertz urges the Commission immediately to revise its rules so that USF contributions are calculated based on current-year rather than prior-year revenues.

In its petition, AT&T relies primarily on the advantage that will be gained under the current system by Regional Bell Operating Companies ("RBOCs") as they enter in-region long distance markets. Hertz agrees that this situation establishes a compelling and independent reason for the Commission to reconsider its current rules. Even if the RBOCs would not be granted an inequitable competitive advantage by the current rules, however, there exist compelling reasons why the current rules must be changed.

The fundamental reasons for amending the current rules are found in the Communications Act and in the Commission's own order adopting the USF regulations. Section 254(d) of the Communications Act ("the "Act"), 47. U.S.C. § 254(d), provides in relevant part that:

> Every telecommunications carrier that provides interstate telecommunications services shall contribute, <u>on an equitable and nondiscriminatory basis</u>, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service. (emphasis added)

To the "equitable and nondiscriminatory" requirements of the Act, the Commission has added the requirement that USF contribution obligations must be "competitively neutral."[1] Taken together, therefore, the Act and the Commission's *Order* require three characteristics in the USF contribution methodology. That methodology must be (1) equitable, (2) nondiscriminatory, and (3) competitively neutral.

For carriers with declining interstate revenues, of which Hertz is one,[2] the current rules necessarily place these carriers in a position that is competitively disadvantageous compared to other carriers. How this happens is as simple as it is discriminatory and inequitable. For carriers with declining interstate revenues, the required USF contribution (based on prior-year

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[1] *See, e.g., Report and Order on Federal-State Joint Board on Universal Service*, CC Docket No. 96-45 (hereinafter the "*Order*") at ¶¶ 47-48 (released May 8, 1997).

[2] That Hertz' interstate revenues are declining is established by the letter sent by USAC to Hertz on March 1, 2000, in which the USAC seeks documentation confirming that decline. See Exhibit 1 hereto.

revenues) will always constitute a larger percentage of current revenues than it will for carriers with level or increasing revenues. The result of this simple fact is that carriers with declining revenues are forced to make a choice: either pass the additional costs on to their customers or absorb the costs. There are no other options.

Carriers with declining revenues that choose to pass the additional costs on to their customers must charge their customers a proportionately higher percentage of the amount billed for current services than must carriers with increasing revenues. This is the option that Hertz has chosen. The result has been a number of questions and complaints by customers regarding the size of the USF charge. Although at this time Hertz cannot state with absolute certainty that it has lost customers because of its policy of recovering USF contributions from customers, the tenor of certain of its exchanges with customers indicates that they have indeed sought other carriers because of the USF charge.

The problem is compounded by a recorded message that the Commission maintains on its automated consumer help line, 1-888-CALLFCC. The universal service fund message accessed through that system not only incorrectly states that the USF contribution that carriers are required to pay is "just below 4%," but also encourages customers to contact carriers to "let them know you believe these charges are inappropriate or too high."[3] With this sort of misinformation being provided to customers by the Commission, it is difficult

[3] A transcript of the Commission's entire USF recorded message is attached as Exhibit 2. Hertz has made numerous informal -- and as yet unsuccessful -- requests to the Commission that this message be corrected or deleted. Hertz hereby reiterates that request.

indeed for carriers to convince customers that the charges that the carrier is passing on are reasonable.

The second choice ostensibly open to carriers is to absorb the charges. This, in fact, is not an option. As the Commission has pointed out in numerous decisions regarding the telecommunications marketplace, competition is the rule of the day. What this means in practice is that there is not enough profit margin remaining in the interstate telephone business to allow a carrier to absorb its USF contribution (especially when it is in fact in excess of the 5.9% nominal rate used to calculate contributions) and still make a profit sufficient to allow that carrier to remain in business. Even if a carrier were able to absorb the USF contribution and still retain a positive return, it would obviously not be in a position to compete on price with carriers that are not forced to internalize such costs.

It is important to note that the market-distorting effects described here are both cumulative and self-reinforcing. Specifically, when a carrier with declining revenues loses customers either because the customer perceives that the carrier is passing on too much of the USF contribution to the customer, or because the carrier cannot compete on price after absorbing the contribution, that carrier's revenues will decline still further. Such declines lead to ever greater gaps between prior-year and current-year revenues, and the need to pass on or absorb an even greater sum in the following year.

An example serves to illustrate the disadvantage imposed by the current rules on carriers with declining revenues. Assume that carrier A has revenues in Year 1 of $10 million, and revenues in Year 2 of $8 million. Assuming a contribution rate of 5.9%, Carrier A would under the current system pay

$590,000 in USF contributions in Year 2. That amount would represent 7.4% of its Year 2 revenues. Assume that Carrier B also has assessable revenues of $10 million in Year 1, but has revenues of $12 million in Year 2. Carrier B will pay the same $590,000 in USF contributions in Year 2 that Carrier A pays. However, that amount will only represent 4.9% of Carrier B's Year 2 revenues as opposed to 7.4% of Carrier A's Year 2 revenues. The difference represents an undeniable market advantage for Carrier B, a market advantage that is over and above any market advantage that Carrier B may have simply as a result of its expanding business.

All of the impacts described above fall upon carriers with declining revenues, but not upon carriers with increasing revenues. That is a simple fact with which Hertz would not expect the Commission to take issue. Given this fact, it cannot seriously be contended that the rule has no competitive impact. Moreover, whatever the precise meaning of the words "equitable" and "nondiscriminatory" in section 254(d) may be, they must, if they are to mean anything, prohibit a contribution methodology that punishes carriers with declining revenues and rewards those with increasing revenues.

In its *Memorandum Opinion and Order and Seventeenth Order on Reconsideration*, FCC 99-280, 65 *Fed. Reg.* 4577 (Jan. 31, 2000), the Commission made the following statement in response to an argument related to that made above regarding the competitive impact of the current contribution methodology:

> The fact that some carriers may have difficulty recovering their contributions from a declining customer base is the product of a competitive marketplace, not an inequitable, discriminatory, or competitively-biased Commission rule.

65 *Fed. Reg.* at 4578. With all due respect, this statement combines two different effects, one caused by a competitive market and one caused by the Commission's rules. That some carriers are experiencing declines in market share and revenues is undoubtedly attributable to market forces that are independent of the Commission's rules. It does not follow, however, that the Commission's rules, when applied to these pre-existing market conditions, have no separate or distinct competitive effect. As the discussion above demonstrates, those rules undeniably act to impose a distinct, substantial, discriminatory, and inequitable competitive disadvantage on certain carriers. It is that impact from which Hertz seeks relief.

Given how the Commission's rules work in practice, Hertz respectfully suggests to the Commission that there is no longer a basis upon which to maintain the position that the rule is nondiscriminatory, equitable, or competitively neutral. It is quite simply none of those things. Accordingly, in light of the discussion above, and in light of the new and convincing arguments raised by AT&T in its petition, Hertz urges the Commission to grant AT&T's petition and to revise its rules at the earliest possible date to adopt a USF contribution calculation methodology based on current-year revenues.

Respectfully submitted,

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April 20, 2000

EXHIBIT 1

USAC
UNIVERSAL SERVICE ADMINISTRATIVE CO.
80 South Jefferson Rd.
Whippany, NJ 07981
Phone: 973/560-4426 Fax: 973/560-4434

Lori S. Terraciano
Associate Manager-Universal Service
Revenue Administration

March 1, 2000

Hertz Technologies, Inc.
5601 NW. Expressway
Oklahoma City, OK 73132

Filer 499 ID:808942

Attn.: Darcy Wilson

RE: September 1, 1999, FCC Form 499-S

A recent review of the 6 month revenues (January - June 1999) reported on your September 1, 1999 FCC Form 499-S for the Federal Communication Commission's Universal Service Fund (USF) reflects a significant decrease in Interstate/International revenues from the average six month revenues reported for the period January – December 1998.

The FCC's Rules[529] provide authorization for the USF fund administrator to request supporting documentation for data submitted to the administrator. Please consider this letter USAC's request for documentation to support the revenues reported on your September 1, 1999 FCC Form 499-S. Please be aware that the FCC and Arthur Andersen, L.L.P., USAC's external auditor, have the authority and the responsibility to also conduct service provider reviews.

Acceptable forms of documentation include audited financial statements, General Ledger Trial Balance data for all revenue accounts, General Ledger subsidiary revenue reports, summary reports of billing runs to subscribers, etc. Please provide written explanations for differences or changes to the previously submitted revenue reports. All documentation forwarded to USAC will be treated as confidential information pursuant to the FCC's rules[530] and will be used to verify FCC Form 499-S reported revenues. Please forward this supporting documentation by April 1, 2000 to:

Universal Service Administrative Company
Attn: Lori S. Terraciano
80 So. Jefferson Road
Whippany, New Jersey 07981

Sincerely,

Lori S Terraciano

Lori S. Terraciano

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529 FCC Rules § 54.707 "The Administrator shall have the authority to audit contributors and carriers reporting data to the administrator."
530 See 47 C.F.R. § 0.457(d).

EXHIBIT

2

THE UNIVERSAL SERVICE ORDER

Universal services help make telephone services affordable for low-income customers and others who live in areas where the cost of providing services are high. The Telecommunications Act of 1996 mandated that Universal Services also support schools, libraries and rural healthcare providers. The FCC adopted new rules to implement this requirement. These rules basically state that all carriers providing long distance telephone services between states will contribute just below 4% of the amount they bill their customers in 1997. This percentage is adjusted every quarter based on projected Universal Service demands. Since service providers are required to pay this percentage, some companies are passing the cost on to their customers. These new billing charges, such as Universal Service fee are between 4.4% and 5.4% and are used to recover the company's own contributions. Other companies have chosen not to pass these additional charges on to their customers. What causes these charges to appear on your bill? Using your calling card, accepting collect calls, or using services not provided by your long distance carrier could result in you being charged with Universal Services. Why does the FCC require the customer to pay these fees? Although telecommunications companies must pay Universal Services fees, the FCC did not require any company to recover these charges directly from the customer. It is your individual long distance carrier's policy that passes these charges along to you. So what can you do about these charges on your bill? Call you long distance carrier; let them know you believe these charges are inappropriate or too high. It's in the company's best interest to meet the needs of its customers. Use your buying power wisely and shop around. Call other companies and ask if they add these charges to your bill. If they do, ask them to explain how they are calculated and what amount they would charge for the services you request. Ask them about special calling plans and per minute rates. Make sure you are getting the best deal for the best type of calls you make. Remember read the fine print. If you have a long distance and/or wireless service contract carefully read it to determine if the company is allowed to add new charges or surcharges to your bill. Long distance and wireless companies have implemented their plans for Universal Services. Some plans differ significantly from others. What these companies are doing is not illegal. You, as the customer, must take charge and use your buying power wisely. You have to find the best plan for the best price that meets your needs.

CERTIFICATE OF SERVICE

I hereby certify that I have this 20th day of April, 2000, served a copy of the foregoing Comments of Hertz Technologies, Inc. on AT&T Petition for Reconsideration, by first-class mail, postage prepaid on the parties named on the attached Service List.

Joyce M. Baker

Joyce M. Baker

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